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Nos. 07-1601 and 07-1607

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In The
Supreme Court of the United States

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BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.

♦

SHELL OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.

♦

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

♦

BRIEF FOR THE STATE OF CALIFORNIA

♦

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's determination that petitioner Shell Oil Company is liable under Section 107(a)(3), 42 U.S.C. § 9607(a)(3), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, as an entity that arranged for disposal of hazardous substances.

2. Whether the court of appeals properly held petitioners Shell Oil Company and The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company jointly and severally liable under CERCLA for the response costs of the United States and California governments, based on the court's determination that neither petitioner satisfied its evidentiary burden of providing a reasonable basis to apportion liability.

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STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") authorizes states and the United States to take prompt action to protect the public and the environment from the harm caused by the release or threatened release of hazardous substances into the environment. Rather than requiring that costs associated with these actions be borne by the government and ultimately the taxpayers, CERCLA authorizes states and the United States to recover their cleanup expenses from the parties responsible for the contamination.

As of March 31, 1998, the Department of Toxic Substances Control of the State of California ("California") had expended more than $400,000 to clean up hazardous substances in the soil and ground water at a former agricultural chemical storage and distribution facility in Arvin, California, and the United States Environmental Protection Agency had spent significantly more. (Pet. App. at 158a-59a, 230a-31a.)[1] The operator of the facility, Brown and Bryant, Inc. ("Brown and Bryant"), is now insolvent and defunct. The governments brought cost-recovery actions pursuant to CERCLA Section 107(a), 42 U.S.C. § 9607(a) against The Burlington Northern and Santa Fe Railway Company, and Union Pacific Railroad

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix in the petition for a writ of certiorari filed by petitioners The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company.

Company ("Railroads"), which owned the western portion of the facility during a period when releases occurred, and Shell Oil Company ("Shell"), which sold and arranged for the shipment of large quantities of chemicals that, as Shell was well aware, were routinely spilled during delivery at the facility. After a bench trial, the district court found the Railroads strictly liable under CERCLA as owners of the facility at the time of disposal (Pet. App. 187a) and Shell strictly liable as having arranged for the disposal of hazardous substance. (*Id.* at 213a.)

The district court declined to impose joint and several liability on the Railroads or on Shell, though it noted that as a result of their "'scorched earth,' all-or-nothing approach to liability," neither "offered helpful arguments to apportion liability." (*Id.* at 236a.) Instead, the court "independently" created a set of calculations based on a series of assumptions, assigning 9% liability to the Railroads and 6% liability to Shell, leaving the governments to bear 85% of their cleanup costs. (*Id.* at 237a, 252a, 256a.)

The court of appeals affirmed in part, holding that Shell was strictly liable as an "arranger" due to its control over, and knowledge of, the chemical transfer process and resulting disposal through leaking and spilling, and reversed in part, holding that the Railroads and Shell did not establish sufficient facts to support apportionment and therefore were jointly and severally liable. (Pet. App. 1a-57a.)

1. Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The two goals of CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, are "to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened" and "to hold responsible parties liable for the costs of these clean-ups." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 3, at 15 (1985). Congress broadly defined the categories of parties potentially liable for the cost of such cleanups. "'The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.'" *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion.)).

California, through its Department of Toxic Substances Control,[2] is authorized to clean up sites

[2] The Department of Toxic Substances Control ("DTSC") is an environmental enforcement agency of the State of California authorized under the California Hazardous Substance Account Act to respond to the release or threatened release of hazardous substances and to imminent or substantial endangerments to the public health, safety or the environment (*see* California Health and Safety Code §§ 25300 *et seq.*), and to recover costs expended on such activities under state or federal law. Cal. Health & Saf. Code §§ 25358.3, 25360; Cal. Health & Saf.

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contaminated by hazardous substances. *See* 42 U.S.C. § 9604(d). California may then recover its response costs from responsible parties through an action under CERCLA Section 107(a), 42 U.S.C. § 9607(a).

To establish a prima facie case under CERCLA for recovery of its costs, California must establish four elements: (1) a "release or threatened release" (2) of a "hazardous substance" (3) from a "facility" (4) which "causes the incurrence of response costs." 42 U.S.C. § 9607(a)(4). California must then establish that a defendant falls within at least one of the four enumerated classes of responsible parties: (1) the owner and operator of a facility, (2) the owner or operator of a facility at the time of any disposal of a hazardous substance, (3) any person who arranged for the disposal or treatment of hazardous substances, or (4) any person who accepts any hazardous substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a). Except for narrow defenses specifically defined at 42 U.S.C. § 9607(b), responsible parties are strictly liable for all response costs incurred by the federal or state government that are not inconsistent with the national contingency plan. 42 U.S.C. § 9607(a)(4).[3]

Code § 5[illegible]009, as added by Gov. Reorg. Plan No. 1 of 1991 (May 17, 1991); 42 U.S.C. § 9607(a).

[3] The national contingency plan, which specifies procedures for preparing and responding to contamination, is codified at 40 C.F.R. pt. 300.

Courts of appeals consistently have held that CERCLA liability is joint and several, except where a responsible party can prove that the harm is divisible. *See, e.g.*, *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 945 (9th Cir. 2002); *Chem-Nuclear Systems, Inc. v. Bush*, 292 F.3d 254, 260 (D.C. Cir. 2002); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001); *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001); *United States v. Township of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721-22 (2d Cir. 1993); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990); *United States v. Monsanto Co.*, 858 F.2d 160, 167, 171-72 (4th Cir. 1988).

In analyzing divisibility of harm in CERCLA Section 107(a) actions, the lower courts have followed the Restatement (Second) of Torts, which provides that damages may be apportioned amongst responsible parties where a party establishes either distinct harms or divisibility resting on a "reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A; *see, e.g.*, *Monsanto*, 858 F.2d at 171-72; *In re Bell Petroleum Servs.*, 3 F.3d 889, 895-97 (5th Cir. 1993); *Brighton*, 153 F.3d at 318; *Hercules*, 247 F.3d at 717. Responsible parties have the burden of demonstrating divisibility by evidence that is "concrete and specific." *Hercules*, 247 F.3d at 717-18. When responsible parties cannot prove distinct harms or divisibility, joint and several liability governs, and each party

is liable for the full amount of the costs incurred. *Chem-Nuclear*, 292 F.3d at 260-61; *Monsanto*, 858 F.2d at 172-73; *Hercules*, 247 F.3d at 717-19.

At the liability stage, apportionment of responsible parties' liability to the government for environmental cleanup costs must be based on proof of divisibility of harm; equitable considerations are relevant only in the contribution stage where a court may allocate damages amongst parties held responsible for the contamination. Parties subject to joint and several liability for reimbursement of cleanup costs may seek contribution from other responsible parties under Section 113 of CERCLA, 42 U.S.C. § 9613. Contribution is available to parties that have resolved their liability to the United States or a state or that have been sued under Section 106 or 107 of CERCLA, 42 U.S.C. §§ 9606, 9607. 42 U.S.C. § 9613(f)(3)(B); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 165-66 (2004). In any contribution phase of litigation, which involves allocation only amongst responsible parties, the courts consistently have held that equitable considerations may be taken into account. 42 U.S.C. § 9613(f)(1) (in contribution action, court may allocate response costs among liable parties using equitable factors that court determines are appropriate); *see Hercules*, 247 F.3d at 718; *Brighton*, 153 F.3d at 318-19; *Bell Petroleum*, 3 F.3d at 901. Considerations of fairness as between responsible parties are not, however, proper at the liability stage. *See United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280-81 (3d Cir. 1993), *overruled on*

other grounds by United States v. E.I. DuPont De Nemours & Co., 432 F.3d 161, 162-63 (3d Cir. 2005) (en banc); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 n.29 (3d Cir. 1992).

2. In 1960, Brown and Bryant commenced operation of an agricultural chemical storage and distribution business on a 3.8-acre parcel (the "B&B parcel"). (Pet. App. 85a.) In 1975, Brown and Bryant expanded its operations by leasing a 0.9-acre parcel owned by the Railroads that adjoined the B&B parcel to the west (the "Railroad parcel"). (*Id.*) Brown and Bryant ceased operating the facility in 1988 or 1989; the company is now insolvent. (*Id.* at 83a-84a, 129a.)

The Brown and Bryant facility stored and distributed numerous chemicals, including the Shell products D-D and Nemagon (soil fumigants containing hazardous substances), and non-Shell products, including various pesticides and the weed killer dinoseb. (Pet. App. 88a.) During their transfer and storage, and in the course of maintaining and cleaning out equipment, hazardous chemicals routinely spilled and leaked onto both parcels. (*Id.* at 92a-96a.) Brown and Bryant "used the leased [Railroad] parcel as part of its total agricultural chemical operations." (*Id.* at 86a.) Spills and leaks on the Railroad parcel occurred when, for example, gauges on D-D rig tanks broke (which they "regularly" did when a hard wind blew), causing "the contents of a half-filled tank" to "slowly spill on the ground" (*id.* at 91a-92a); employees rinsed out mobile "nurse" tanks or checked their filters, or the nurse gauges broke (*id.* at 92a); employees

transferred D-D to two-ton "bobtail" trucks (*id.* at 93a); employees washed chemicals off the warehouse apron and hosed out the warehouse (*id.* at 94a); and drums of stored material leaked to the ground. (*Id.* at 95a.) Wherever it was located, "the corrosive D-D caused rubber seals on pumps and valves to fail suddenly and unexpectedly, causing big leaks." (*Id.* at 115a.) Spill and leaks on the B&B parcel occurred in similar ways (*see, e.g., id.* at 92a, 111a (rinsing out "nurse" tanks on a "wash rack")) and, in addition, in the process of delivering chemicals (described below). (*Id.* at 119a-24a.)

The B&B parcel was graded toward a pond located in the southeast portion of the site. (*Id.* at 95a.) A pipe allowed the water on the Railroad parcel also to drain to the pond. Over the course of the facility's operation, spills and leaks created a single plume of ground water contaminated by hazardous substances that threatened municipal drinking water supplies. (*Id.* at 145a-46a; 174a; 237a-38a; 245a-46a.)

3. To protect public health and the environment, the California and federal governments began to clean up the contamination at the facility pursuant to their authority under CERCLA and, in so doing, incurred substantial remediation costs at the site. (*Id.* at 229a-231a.) The governments filed suit against Brown and Bryant, the Railroads, and Shell seeking reimbursement of investigation and cleanup costs pursuant to CERCLA Section 107(a), 42 U.S.C. § 9607(a). In 2003, after a bench trial, the district

court issued its Amended Findings of Fact and Conclusions of Law. (*Id.* at 82a-262a.)

a. The district court held that the government plaintiffs established a prima facie case of CERCLA liability against both the Railroads and Shell. (*Id.* at 176a-83a (Railroads); *id.* at 208a-19a (Shell).) The court determined that the "entire Arvin plant (both parcels)" constituted a single "facility," and Brown and Bryant's operations released hazardous substances to the environment throughout the facility. (*Id.* at 172a-74a.) According to the district court, there was evidence of contamination relating to both parcels. (*Id.* at 174a.) The court found that the pond, a sump on the B&B parcel that was connected to the pond, and a dinoseb spill area on the B&B parcel "were and are the primary sources of the ground water contamination at the Site." (*Id.* at 104a, *see also id.* at 251a.) The court further found, however, that "[i]t is not within the realm of science to quantify the contribution from the Railroad parcel over the ground surface or through focused infiltration that has reached the ground water under the Site" and that the contamination for each parcel could not be exactly quantified. (*Id.* at 112a.) Accordingly, the district court found that the resulting ground water plume "poses an indivisible threat of leaching and diffusing contaminants to lower groundwater suitable for drinking." (*Id.* at 172a; *see id.* at 174a.)

The district court held that the Railroads were liable under CERCLA as owners of a facility at the time of disposal of hazardous substances, (*id.* at 176a-83a); *see* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), and that Shell was liable as a party that had "arrange[d] for disposal" of hazardous substances, noting that "disposal" under CERCLA includes any leaking or spilling of a hazardous substance. (*Id.* at 208a-19a); *see* CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

The district court found that Shell had the authority under the conditions of sale to determine the means and methods of delivery and unloading of the D-D, that Shell "was an active participant in the D-D shipment, delivery and receiving process at Arvin with knowledge that spills and leaks of hazardous D-D were inherent and inevitable," and that such spills and leaks "occurred throughout the period Shell sold D-D" to Brown and Bryant. (*Id.* at 204a.) The district court noted that in the early 1960s Shell began to require its distributors, including Brown and Bryant, to cease buying D-D in barrels and purchase in bulk in order to ensure that they had adequate supplies of the chemicals on hand. (*Id.* at 115a.) The "bulk storage prescribed by Shell . . . was intended to and did economically benefit Shell." (*Id.*) The bulk purchase of the chemicals required Brown and Bryant to maintain large storage tanks and necessitated the use of hoses to transfer the chemicals from the delivery trucks to the tanks. (*Id.* at 119a-24a.) Shell determined and arranged for the means and methods of

delivery to the site, including hiring tanker trucks; Shell required the trucks to have specific equipment for unloading the chemical. (*Id.* at 114a-15a, 120a, 123a.) Shell owned the chemicals at the time it made these arrangements. (*Id.* at 124a-25a, 211a.) For most of the relevant time period, the trucking companies that were contracted by Shell performed the actual unloading of chemicals, rather than Brown and Bryant personnel. (*Id.* at 208a-09a.) It was only after 20 years, in the early 1980s that Shell directed that the unloading should be done by Brown and Bryant employees. (*Id.* at 209a.) Shell specified the procedures for unloading the chemical from the trucks and for storing the chemicals at the site. (*Id.* at 208a-09a.)

In transferring the D-D from truck to tank, the transporter placed a bucket under the hose connection. (*Id.* at 119a.) When the transfer was complete, the transporter would drain the hoses into a bucket and the contents would be dumped either into a Brown and Bryant tank maintained for "dregs" or back into the tanker truck. (*Id.* at 120a.) Spills often occurred during this process. (*Id.* at 119a-20a.) At times, the hoses overflowed the buckets, the buckets tipped over, or the hose would be tossed on the ground and residual material would drain from the hose. (*Id.* at 121a.) Further, feeding the hose into the trucks' hose tubes would cause leaks onto the ground. (*Id.*) The court found that "spills were inherent in the delivery process that Shell arranged, and always

occurred, in differing degrees of magnitude." (*Id.* at 119a; *see id.* at 209a.)

Shell knew that spills routinely occurred during the process it prescribed, and therefore reduced the purchase price of the chemical D-D in an amount, the district court concluded, that was linked to such loss. (*Id.* at 122a-24a.) "However characterized, there was a monetary allowance to Brown and Bryant for product Shell expected to be lost in the process of delivery and storage." (*Id.* at 122a.) In addition, the district court noted the control that Shell asserted throughout the delivery process. For instance, if it was determined that the facility was inadequately maintained for receiving and storing the D-D, by contract Shell had the right to require the truck to return to the terminal; the court held that under these circumstances, legal title would not pass to Brown and Bryant, but would remain with Shell. (*Id.* at 211a-12a.)

b. Having found the Railroads and Shell liable, the district court next addressed whether each should be held jointly and severally liable for the governments' response costs, noting "each defendant bears the burden of proof on apportionment." (*Id.* at 232a.) As a result of the Railroads' and Shell's decision to deny all liability, the court found that "no party has specifically documented the relative contributions of contamination from either parcel" (*id.* at 248a), and that there is "no evidence to quantify the difference in volume of the releases" from the Railroad and Brown and Bryant parcels. (*Id.* at 252a.)

The district court expressed frustration at the lack of evidence addressing divisibility of harm, noting the Railroads' and Shell's "scorched earth," all-or-nothing approach to liability. (*Id.* at 236a.) It observed that neither the Railroads nor Shell "offered helpful arguments to apportion liability" (*id.*), and that they "effectively abdicated providing any helpful arguments to the court." (*Id.* at 236a-37a.) Rather than holding the Railroads and Shell jointly and severally liable as a result of their having failed to carry their burden, the district court instead held that the Railroads' and Shell's failure of proof "left the court to independently perform the equitable apportionment analysis demanded by the circumstances of the case." (*Id.* at 236a-37a.)

As authority for conducting an "equitable apportionment," the court cited CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), which governs allocation of damages as amongst liable parties in a contribution action. (*Id.* at 239a.) The court prefaced its inquiry with the observation that the "contribution from the Railroad parcel" to the "indivisible" plume was "incalculable." (*Id.* at 237a-38a.) The court nonetheless created a multi-part equation by which, in its view, the Railroads' "several liability may be roughly calculated." (*Id.* at 251a.)

First, the court noted that the surface area of the Railroad parcel was 19% of the total site surface. (*Id.*) Second, it noted that the Railroads' 13-year lease to Brown and Bryant constituted 45% of the site's total 29 years of operation. (*Id.*) The court next observed

that Nemagon and dinoseb were stored on the Railroad parcel, and summarily concluded that these two chemicals, "contributed to ⅔ of overall Site contamination." (*Id.*) The district court acknowledged that "[t]here is no evidence to quantify the difference in volume of the releases" but concluded that "based on the considerable evidence of the relative levels of activity and number of releases on the two parcels, the Railroad parcel could not have contributed to more than 10% of the volume or mass of the overall site contamination resulting from Brown and Bryant's hazardous substance-release producing activities as the sole site operator and owner of over 80% of the site." (*Id.* at 252a.) The court then multiplied the three percentages, stating that "if 19% is multiplied by 0.45 (13 years of storage on Railroad parcel use/28 years of [Brown and Bryant] operations) and multiplied by ⅔ (dinoseb and Nemagon contamination) the relative figure of 6% is reached." (*Id.*) Finally, the court adjusted the Railroads' liability, "[a]llowing for calculation errors up to 50%," to 9%. (*Id.*)

Turning to Shell, the district court first acknowledged that "Shell did not present evidence how its products' contribution to the contamination at the Arvin facility can be apportioned." (*Id.* at 252a.) The court nonetheless attempted to "roughly calculate" (*id.* at 253a) the amount of D-D spilled during the 23 years of Shell-controlled deliveries. (*Id.* at 253a-57a.) The starting point of the calculation was the amount of D-D that Shell sold to Brown and Bryant during that time period. (*Id.* at 253a, 89a-90a.) The record

contained sales data only for six years. (*Id.*) For one of those years, the total gallons sold were substantially less than the other five, causing the court to conclude that that year was "statistically aberrational." (*Id.* at 253a.) Based on the remaining five years of sales data, the court assumed that for each of the 23 years, delivery trucks arrived at the site with an average of 122,390 gallons. (*Id.* at 254a.) The court further assumed transport by 4,500 gallon trucks, yielding 27 delivery loads of D-D per year. (*Id.*) The court then assumed a typical spill scenario at delivery of three gallons per load, yielding 81 gallons spilled at delivery (27 x 3) and 122,309 gallons being placed into bulk storage (122,390 - 81) each year. (*Id.*) Over the 23-year period, based on the court's assumptions, 1,863 gallons were spilled at delivery. (*Id.*)

The court then created a series of spill assumptions for each stage of operations at the Brown and Bryant facility, including the transfer of D-D from bulk storage to bobtail trucks, D-D rigs, and nurse tanks; washing of bobtails; checking of nurse tank filters; rinsing of nurse tanks; and checking filters on D-D rigs. (*Id.* at 254a-56a.) At each step, the court made assumptions about equipment capacity, average size of spills, and regularity of cleaning and maintenance. (*Id.* at 254a-56a.) Dividing 1,863 gallons (the assumed D-D spills at delivery) by 31,212 (the total assumed D-D spills), the court concluded that Shell was responsible for approximately 6% of the spills at the facility, and therefore should be severally liable for 6% of the total site response costs.

(*Id.* at 256a-57a.) The district court made no findings linking this assumed spill volume to the soil or ground water contamination at the site.

The district court found Brown and Bryant jointly and severally liable. However, Brown and Bryant is insolvent; the defunct company cannot contribute to the governments' cleanup costs. (*Id.* at 129a and 241a.)

4. Shell appealed the district court's holding that it was liable as an "arranger" under CERCLA. (*Id.* at 11a-12a.) The governments appealed the district court's apportioning of liability to Shell and the Railroads and its rejection of joint and several liability. (*Id.* at 11a.) The governments asserted on appeal that joint and several liability should have been imposed on Shell and the Railroads because they had not presented sufficient evidence at trial to justify the apportionment of liability. (*Id.* at 11a-17a.) The court of appeals affirmed in part and reversed in part. (*Id.* at 1a-57a.)

a. The court of appeals affirmed the district court's ruling that Shell is a liable party under CERCLA as one that "arranged for disposal" of hazardous substances. (*Id.* at 47a-55a.) The court observed that "arranger" liability extends not only to direct arrangements for disposal of hazardous substances, but also to arrangements in which such disposal is a foreseeable byproduct of, but not the purpose of, the transaction. (*Id.* at 48a-50a.) The court also noted that CERCLA's definition of "disposal"

includes the processes of "spilling" and "leaking." (*Id.* at 50a-51a.) The court of appeals noted that the district court had focused on several aspects of Shell's involvement with the Brown and Bryant site. These included: the frequency of spills at the site; Shell's arrangement of delivery and choice of carrier; Shell's encouragement of the bulk delivery method, which necessitated transfers of large quantities of chemicals causing spills and corrosion leaks; and Shell's purchase price rebate that the district court found "was linked to loss from leakage." (*Id.* at 53a-54a.) Consequently, the court of appeals held that Shell "had sufficient control over, and knowledge of, the transfer process to be considered an 'arranger'" under CERCLA. (*Id.* at 55a.)

b. The court of appeals reversed the district court's determination of divisibility and held Shell and the Railroads jointly and severally liable. (*Id.* at 19a-47a.) The court held that while liability under CERCLA generally is joint and several, "[i]n line with every circuit that has addressed the issue . . . apportionment is available at the liability stage" under appropriate circumstances. (*Id.* at 20a-21a.) The court next addressed whether the particular harm at issue is, by its nature, too unified for apportionment – that is, whether, as a matter of law, apportionment would be unavailable based on the facts of this case. (*Id.* at 36a.) Reviewing this question de novo, it agreed with the district court that the harm was capable of apportionment. (*Id.* at 36a.)

The court of appeals relied on the apportionment analysis of Restatement (Second) of Torts Section 433A (Pet. App. at 22a-26a), which provides that damages may be apportioned where there are distinct harms or where there is a "reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A(1)(b). The court held that equitable considerations are not appropriate for purposes of apportioning liability among responsible parties at the liability stage. (Pet. App. at 30a-34a.)

With respect to the Railroads, it held that the district court's apportionment calculation, based solely on percentage of land area, duration of ownership, and leakage volumes, lacked a reasonable basis in the record. (*Id.* at 37a-44a.) The court of appeals also held that the district court erred in assigning a ⅔ fraction to represent the types of hazardous substances on the Railroad parcel because all three chemicals (D-D, Nemagon and dinoseb) were on the Railroad parcel at some time. (*Id.* at 42a.)

With respect to Shell, the court of appeals held that the evidence produced at trial was insufficient to determine Shell's proportional share of the site contamination. (*Id.* at 44a-47a.) The court held that the evidence did not provide a reasonable basis to sustain the district court's conclusions because the site was contaminated with a number of chemicals, and because Shell had failed to introduce any evidence from which a court could identify the percentage of contamination that was attributable to its

leaked chemicals. The court of appeals also held that the district court's calculations for the leakage of Shell chemicals at the site were far too speculative to provide a basis for apportioning liability. (*Id.* at 45a-46a.)

Because Shell and the Railroads took an all-or-nothing approach to liability and failed to sustain their burden of proof to support an apportionment of liability, the court of appeals reversed the district court's "equitable apportionment" and imposed joint and several liability. (*Id.* at 47a.)

Shell and the Railroads petitioned for rehearing en banc. Eight judges dissented from the order denying rehearing. (*Id.* at 57a.) The dissenting judges were of the view that the court's decision placed arranger liability on Shell as a "mere seller." (*Id.* at 60a-61a.) The dissent agreed that the Restatement test should apply to apportionment of liability, but opined that the court of appeals applied the test in an overly stringent manner and characterized the district court's apportionment calculations as "meticulous." (*Id.* at 60a.)

♦

SUMMARY OF ARGUMENT

In the wake of the environmental disaster at Love Canal, Congress created CERCLA and its very

expansive liability scheme.[4] Unequivocally, Congress intended that hazardous contamination be remediated and that the costs be borne by responsible parties. This case raises two straightforward issues concerning CERCLA liability – the scope of arranger liability and the availability of apportionment in the absence of evidence of divisibility of harm based on considerations of equity.

It is well established that "arranger liability" under CERCLA is not limited to situations where the defendant has entered into a contract that focuses on the disposal of hazardous substances, such as the disposal of spent product or contaminated drums. While California and Shell agree that arranger liability does not apply to entities that merely sell or ship product containing hazardous substances that are eventually disposed of through the attenuated actions of the recipient, under CERCLA, "disposal" includes the spilling and leaking of hazardous substances to the environment. Arranger liability includes actions that go well beyond merely sending away hazardous waste with the specific intention that it be dumped. *See, e.g., United States v. Shell Oil Co.*, 294 F.3d 1045, 1054-55 (9th Cir. 2002); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990); *Mathews v. Dow Chemical*

[4] *See Metro. Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824, 826-27 (7th Cir. 2007); *United States v. Bestfoods*, 524 U.S. 51, 55 (1998).

Co., 947 F. Supp. 1517, 1519-20 (D. Colo. 1996); *Courtaulds Aerospace, Inc. v. Huffman*, 826 F. Supp. 345, 347-48, 353-54 (E.D. Cal. 1993).

In this case, Shell's arrangement with Brown and Bryant led to, and resulted in, spilling and leaking of agricultural chemicals at the facility. Shell knew that leaks and spills of the chemicals were inherent in its prescribed procedures, (Pet. App. 209a) – so much so that it gave the facility credit for product lost in delivery and storage. (*See id.* at 122a.) Shell, in effect, charged Brown and Bryant only for the chemicals that were actually placed into Brown and Bryant's tanks and not for chemicals spilled in delivery.

As determined by the trier of fact, and fully supported by the record in this case, Shell arranged for and controlled the transportation and delivery of hazardous substances to the Brown and Bryant facility with the expectation that a portion of the hazardous substances routinely would be spilled (and therefore disposed of) onto the ground in the course of the transactions. Under CERCLA's broad scope, Shell's actions constitute arranger liability even though disposal was not the central focus of the transaction.

Shell, held liable as an arranger, and the Railroads, held liable as owners at the time of disposal, bear the burden of establishing a basis for apportionment of harm in order to avoid joint and several liability. Neither met its burden in this case.

There is no dispute that if adequate information is available, divisibility may be established by relevant geographic, volumetric, or chronological evidence. (Pet. App. 24a.) *See Hercules*, 247 F.3d at 719; *Bell Petroleum*, 3 F.3d at 895-96; *United States v. Township of Brighton* ("*Brighton II*"), 282 F.3d 915, 919-20 (6th Cir. 2002). The court of appeals narrowly held "that, in this case, Shell and the Railroads failed to show that expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability." (Pet. App. 24a (internal quotation omitted).)

There is no dispute that the harm in this case, in theory, was capable of apportionment had Shell and the Railroads elected to present evidence (e.g., expert opinion testimony based on data and on the types of assumptions that experts are authorized to make). They did not. The record below reflects Shell's and the Railroads' strategic choice to assume – as the district court and court of appeals both observed – a "scorched earth" and "all-or-nothing" approach to liability. (Pet. App. 236a, 15a.) As the district court observed, "[n]either party offered helpful arguments to apportion liability." (*Id.* at 236a.)

The district court erroneously believed that it was required sua sponte to apportion the damages, even in the absence of evidence. This led to the court's complex calculations, consisting of a series of assumptions that the court multiplied together, resulting in small fractions of liability for both Shell and the Railroads. The district court based its assumptions on

its best guesses, notwithstanding the complicated chemistry of the site, the convoluted history of disposal, the many possible pathways to contamination, and the literally dozens of open questions concerning virtually every aspect of the harm. It also believed, in error, that equity required it to divide the harm, confusing apportionment of liability to the government with allocation of damages as amongst responsible parties. The district court's unprecedented approach runs counter to the law that places the burden of proof for apportionment on parties held liable under CERCLA and allows for considerations of equity only in contribution actions as between liable parties.

On the record before this Court, Shell and the Railroads have failed to provide a reasonable basis for divisibility. As a result, both are subject to joint and several liability.

♦

ARGUMENT

I. Shell Arranged for Disposal of a Hazardous Substance and Therefore Is a Liable Party Under CERCLA

Shell asks this Court to rewrite CERCLA to limit arranger liability to parties that possess a hazardous substance and make arrangements specifically intended to dispose of it as a hazardous waste. The plain language of CERCLA and 25 years of case law

make clear that arranger liability is not so narrowly construed.

Under CERCLA, arranger liability is a fact-intensive determination in which the court must look beyond the defendant's characterization to whether the transaction, in fact, involves an arrangement for "disposal." *See Morton Int'l v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003). CERCLA defines, "disposal" to encompass not only intentional discarding, but also inadvertent or incidental leaking and spilling. *See* 42 U.S.C. § 9601(29); 42 U.S.C. § 6903(3).

As the district court determined, and the court of appeals affirmed, the record supports the findings underlying Shell's liability as an arranger. For example, Shell owned and possessed the chemical D-D at the time it arranged for delivery to Brown and Bryant; controlled the procedures for shipment, delivery, and unloading of the chemical at the Brown and Bryant site; knew that spills were an inevitable consequence of the delivery and unloading procedures and that spills were in fact occurring throughout the entire period of the sale to Brown and Bryant; knew that some portion of the chemical was being spilled before it could be transferred to Brown and Bryant's control or ownership; and even reduced the price of the shipment to account for those spills. Under these circumstances, Shell arranged for disposal of a hazardous substance.

A. Arranger Liability Under CERCLA Is Broadly Construed Based on the Facts Surrounding the Transaction

A responsible person under CERCLA includes "any person who, by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . ." 42 U.S.C. § 9607(a)(3). Although "arranged for" is not specifically defined in the statute, courts have broadly interpreted the phrase in order to effectuate CERCLA's direction that companies responsible for introducing hazardous waste into the environment bear the costs of the cleanup. *See Morton*, 343 F.3d at 676; *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989). The determination of "arranger liability" is a fact-intensive inquiry that must be made in light of the totality of circumstances. *See Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 775 (4th Cir. 1998); *South Florida Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996); *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 566 (9th Cir. 1994).

Courts, of course, are not bound by a defendant's characterization of the transaction as a mere sale of a useful product, and look beyond that characterization to determine whether the transaction amounts to an arrangement for treatment or disposal of a hazardous substance. *Morton*, 343 F.3d at 677; *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999); *Aceto*,

872 F.2d at 1381-82. Here, as discussed below, the district court found on the evidence that Shell's actions involved significantly more than the mere sale of a useful product; Shell knew that its actions would result in the spilling and leaking of a hazardous substance on delivery.

B. An Entity Is Liable as an Arranger When It Knows That Disposal of a Hazardous Substance Is an Inherent and Inevitable Part of the Transaction

There is no dispute that arranger liability arises when a defendant enters into a transaction in which the central purpose is to dispose of a hazardous waste. (Shell Br. 18-19); *see United States v. Shell Oil Co.*, 294 F.3d at 1054 (referring to this as "direct" arranger liability). Shell's conduct falls outside of such "direct" arranger liability.

The courts have, however, recognized that arranger liability also arises in a broader context in which disposal of hazardous wastes is not the direct purpose of the transaction. *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752-53 (9th Cir. 1994); *Aceto*, 872 F.2d at 1381; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512 (11th Cir. 1996); *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1088 (8th Cir. 1995). Rather, an entity with control over a process that it knows can or will result in the release of hazardous substances is an arranger. *Morton*, 343 F.3d at 676. As the Third Circuit noted,

> proof of a defendant's knowledge that hazardous waste can or will be released in the course of the process it has arranged for, provides a good reason to hold a defendant responsible because such proof demonstrates that the defendant knowingly (if not personally) contributed to the hazardous-waste contamination. Thus general knowledge that waste disposal is an inherent or inevitable part of the process arranged for by the defendant may suffice to establish liability.

Morton, 343 F.3d at 678. Thus, under CERCLA, the government need not prove a specific intent to dispose of hazardous substances as waste in order to establish arranger liability.

Arranger liability is not without limit. The courts routinely have distinguished cases where the evidence shows that the defendant sold a useful, though hazardous, product without any knowledge or control concerning the ultimate disposal of that product, *see, e.g., Freeman*, 189 F.3d at 164; *3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355, 1362 (9th Cir. 1990); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1514, 1520 (11th Cir. 1996), from those cases where the defendant knowingly set into action a chain of circumstances that led directly to disposal as an inherent part of the transaction, even though disposal was not necessarily the purpose of the transaction, *see, e.g., Aceto*, 872 F.2d at 1381; *Catellus*, 34 F.3d 752-53; *Courtaulds*, 826 F. Supp. at 353. The first set of facts gives rise to arranger liability, while the second does not.

A manufacturer that sells a useful product and knowingly loads it into a leaking tanker truck has made an arrangement that will lead inevitably to disposal of some portion of its product as a hazardous waste. Similarly, a manufacturer that establishes and controls the method of delivery of its useful product in a manner that it knows will inevitably result in some portion of the product being spilled and disposed during the transfer, has arranged for the disposal of a hazardous waste. Neither can escape liability under CERCLA simply by claiming that the purpose of the transaction was merely to sell a useful product.

C. Shell Is Liable as an Arranger Under CERCLA Because It Owned the Hazardous Substance, Arranged the Procedures for the Transfer, and Knew that Disposal on Delivery Was an Inevitable Result of Its Arrangements

Shell characterizes its actions in sending D-D to the Brown and Bryant facility as merely an innocent arrangement for the sale of a useful product. Shell's characterization is belied by the district court's detailed findings, which are supported by abundant evidence of Shell's involvement. Shell entered into transactions with Brown and Bryant knowing that large amounts of chemicals in Shell's possession ("hazardous substances" under CERCLA) would routinely spill and leak onto the ground before they were placed into Brown and Bryant's bulk tanks for use.

As the Brief for the United States discusses in detail, it is undisputed in the record that Shell was deeply involved in the delivery process. Under the contracts of sale, Shell determined and arranged for the means and methods of delivery of D-D to the site, including hiring the tanker trucks and requiring them to have specific equipment for unloading the D-D into bulk storage. (Pet. App. at 114a-15a, 119a-20a, 124a.) Shell owned the chemical at the time these arrangements were made. (*Id.* at 124a-25a, 211a.) Shell required the facility to follow certain procedures in unloading the trucks and storing the chemical on-site. (*Id.* at 208a-09a.) At one point, Shell changed the delivery process from sealed drums to bulk delivery, requiring Brown and Bryant to use large storage tanks that necessitated the transfer of the D-D with hoses and resulted in leaks from the transfer process and storage tanks. (*Id.* at 114a-15a, 119a-22a, 209a.) Shell knew that spills were inherent in the process that it dictated for transporting and unloading the chemicals (*id.* at 122a-24a), and took into account those spills by providing for a "monetary allowance to [Brown and Bryant] for product Shell expected to be lost in the process of delivery and storage." (*Id.* at 122a.)

Finally, legal title of the Shell chemical did not pass automatically to Brown and Bryant when the delivery truck entered the site. (*Id.* at 124a.) Thus, if the transporter found that Brown and Bryant's facility was not adequately maintained for receiving and storing the D-D, Shell could order the tanker

truck to return to the terminal. (*Id.* at 124a, 211a-12a.)

Under these circumstances, Shell is significantly more than a mere seller that relinquished control over its products upon delivery and before any spill occurred. This is not a case, as posited in the dissent to the denial of en banc review, in which "sellers of chemical products will be saddled with the entire clean-up cost of a facility contaminated in part with their products, even if they lacked control over the products spilled following the sale." (*Id.* at 80a.) Rather, under CERCLA's well-recognized rules of arranger liability, Shell controlled the method of delivery of its product in a manner that it knew would result – and was resulting – in spills of hazardous substances as part of the process of delivery to the buyer. Indeed, Shell even *paid* for the spilled chemicals, charging Brown and Bryant only for what did not spill. (*Id.* at 122a.)

The result here is not contrary to *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (1993), the case upon which Shell most heavily relies. In *Amcast*, a manufacturer of trichloroethylene ("TCE") sold it to a customer and delivered it either in its own trucks or by hiring a common carrier. In both cases, spills resulted from the delivery of the chemical. The Seventh Circuit held that the manufacturer was liable as the owner of a facility under CERCLA when it delivered the TCE in its own trucks, but was not liable as an arranger when it contracted with a common carrier to deliver the chemical. *Amcast*, 2 F.3d at 751.

In *Amcast*, apart from hiring the transporter, there is no suggestion that the TCE manufacturer exercised control over the method of delivery of the chemical, adjusted the price of the chemical due to spillage, or retained legal control and ownership of the chemical such that it could refuse to off-load the chemical if the facility was not adequately prepared to cooperate in the transfer and handling of the chemical. Here, the district court found that the facts demonstrate Shell's significant level of control over the delivery process and its knowledge and anticipation of spills, as well as Shell's ability to preclude the transfer process if it so chose.

The other cases relied on by Shell underscore the facts that establish Shell's arranger liability. Unlike the cases Shell cites, this case does not raise the specter of imposing arranger liability on a product manufacturer solely because there is ultimately a disposal after the product has served its useful purpose, (*see 3550 Stevens Creek*, 915 F.2d at 1362-65; *Dayton Indep. School Dist. v. United States Mineral Products, Inc.*, 906 F.2d 1059, 1065 (5th Cir. 1990); *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 287-88 (2d Cir. 1992)); or on a seller for a disposal that occurs decades after sale of a useful product due to a third party's negligence, (*see Freeman*, 189 F.3d at 164); or on a seller of a facility storing a useful product where disposal occurs after deterioration of the facility, (*see AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993)). Here, the disposal occurred due to

procedures controlled by the seller, before the product could even be transferred to the physical control of the buyer, and the seller had full knowledge that such disposal would occur.

In the CERCLA context, courts have long distinguished between those cases where a party has merely made a sale of a useful product (recognizing that some disposal likely will occur eventually after the product is used), and those cases where the seller has attempted to "close its eyes" to disposals that are inherent in its arrangement. *See Aceto*, 872 F.2d at 1380. Shell asks this Court to permit Shell to close its eyes to disposals of hazardous waste that were inherent in the arrangements that it made for transfer of its materials and that were well-known to it. CERCLA does not permit Shell to escape liability for the inevitable results of its own arrangements.

D. Shell's Reading of Arranger Liability Is Contrary to CERCLA's Broad Scheme

1. Arranger Liability Under CERCLA Does Not Require a Specific Intent to Dispose of Hazardous Waste

Ignoring decades of court opinions and the unequivocal intent of Congress for an expansive reading of CERCLA liability provisions, Shell contends that the statutory terminology "arranged for treatment or disposal of a hazardous substance" must be read narrowly pursuant to a dictionary definition to apply only when the defendant affirmatively intends to

dispose of a hazardous waste. (Shell Br. at 18-19.) Under Shell's reading, a manufacturer could entirely escape CERCLA liability if it sold a hazardous chemical as a useful product and knowingly loaded the chemical for delivery into a corroded and leaking tanker truck, and the truck spilled the chemical on the delivery site, as long as the manufacturer did not own the truck that spilled the substance, did not "intend to dispose of hazardous waste," and merely intended to save money by hiring a cheap transporter. This argument distorts CERCLA's purpose to hold parties responsible for the costs of remediating the contamination they cause, regardless of their specific intent. *See Aceto*, 872 F.2d at 1378-82, 1384 (arranger liability arises when spills are "inherent" in the formulation process and "waste is generated and disposed of contemporaneously with the process").

Further, taking Shell's dictionary analysis to its logical conclusion leads to an inconsistent result. Shell acknowledges that CERCLA incorporates the definition of "disposal" contained in the Solid Waste Disposal Act ("SWDA"). 42 U.S.C. § 9601(29). Under the SWDA, disposal is defined as "the discharge, deposit, injection, dumping, *spilling, leaking*, or placing . . . of any . . . hazardous waste into or on any land" so that it "may enter the environment . . . ." 42 U.S.C. § 6903(3) (emphasis added). One of the primary dictionary definitions of "leaking" is "to enter or escape through a hole, crevice, or other opening, usually by a fault or mistake." Webster's Third New International Dictionary Unabridged (2002). Similarly, "spill"

is defined as "to cause or allow to pour, splash, or fall out and be wasted, lost or scattered." *Id.* Inherent within the plain meaning of the terms "leak" and "spill," therefore, is the notion of mistake, inadvertence, or lack of intentionality. Interpreting the phrase "arrange for" narrowly, as Shell requests, creates a statutory construction problem, as it would read "spilling" and "leaking" out of the definition of arranger liability, even though Congress expressly chose to include it.

Shell argues that under the plain language of the statute, arranger liability applies only to an entity that affirmatively intends to dump waste into the environment. As the Third Circuit noted in *Morton*, 343 F.3d at 676, the "dictionary definition of 'arrange' does not shed much light on the proper scope of liability" under CERCLA. Instead, the only reasonable reading of the statutory language is that "arrange for disposal" encompasses liability for an entity that makes arrangements concerning a hazardous substance, knowing that such arrangements will lead to the leak or spill of that substance, thus resulting in the disposal of a hazardous substance before it can be used. Shell's actions satisfy this definition.

2. The Solid Waste Disposal Act's Definition of "Disposal" Does Not Limit CERCLA Arranger Liability

Shell argues that because the D-D was not a hazardous waste at the time Shell shipped it to

Brown and Bryant, it was a useful product and not a waste, and, therefore, any spill of D-D in the process of delivery cannot give rise to arranger liability. While CERCLA identifies disposal of "hazardous substances" as the basis for liability, it also incorporates the definition of "disposal" from the Solid Waste Disposal Act ("SWDA"). *See* 42 U.S.C. § 9601(29). The SWDA concerns "wastes" rather than "substances," and defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing . . . of any hazardous waste into or on any land . . . " 42 U.S.C. § 6903(3).

Under the SWDA, waste is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other *discarded material* . . . ." 42 U.S.C. § 6903(27) (emphasis added). As such, a "discarded material" may begin as a useful product and become a waste upon being discarded, disposed of, thrown away, or abandoned. At the point of being discarded, it is no longer a useful product and becomes a waste. *Ass'n of Battery Recyclers, Inc. v. United States EPA*, 208 F.3d 1047, 1052 (D.C. Cir. 2000); *see also Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) (gasoline entering soil is no longer useful and therefore constitutes solid waste for purpose of SWDA).

Stated another way, arranger liability under CERCLA applies to hazardous substances once they are disposed of, necessarily becoming waste, and attaches when the responsible party arranges for that disposal, even though, at the time of the arrangement,

the substance has not yet become a waste. As a result, Shell's SWDA-based argument provides no exemption. The hazardous substance, Shell's D-D, was a useful product when it was in transport to Brown and Bryant, and that portion that was placed into Brown and Bryant's storage tanks continued to be useful, available for agricultural application. The D-D that spilled during delivery to the tanks, however, became a hazardous waste as defined under the SWDA as soon as it touched the ground, never having reached the storage tanks. As such, the spilling and leaking of D-D during delivery constitutes disposal of a hazardous substance under CERCLA.

II. While Liability Under CERCLA May Be Apportioned Based on Evidence of Divisibility of Harm, the Railroads and Shell Failed to Establish a Factual Basis for Apportionment

A. The Court Below Applied the Proper Standards of Review

In line with all cases that have addressed the issue, the court of appeals acknowledged that apportionment generally is available in CERCLA cases at the liability stage and, further, that the harm at issue in this case theoretically was capable of apportionment. (Pet. App. 20a-21a.) The question presented, however, is whether the Railroads and Shell "submitted evidence sufficient to establish a reasonable basis for the apportionment of liability." (*Id.* at 36a.) The court of appeals reviewed the district court's determination

consistent with the law of other circuits and the Restatement. *See, e.g., Bell Petroleum*, 3 F.3d at 896 (question whether harm is capable of apportionment is question of law; actual apportionment of damages is a question of fact); *Hercules*, 247 F.3d at 718-19; Restatement (Second) of Torts § 434 cmt. d.

The Railroads and Shell contend that the court of appeals did not apply a clear error standard in reviewing the district court's findings. (Shell Br. 49; Railroads Br. 39.) A reviewing court must, of course, defer to the fact finder's determinations on matters involving credibility. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (factual findings entitled to substantial deference, reversed only for clear error). The court of appeals did, in fact, defer to the trial court's factual findings. It accepted, for example, the district court's determinations that the Railroads owned 19% of the site and that spills regularly occurred on delivery of D-D. The court of appeals held merely that the trial court's independent cobbling together of various anecdotal facts and unsupported assumptions to make a case for "equitable apportionment" of liability was not authorized by law. This was well within a reviewing court's role. *See United States v. Taylor*, 487 U.S. 326, 337 (1998) (where judgment constitutes application of law to facts, reviewing court must undertake more substantive scrutiny to ensure judgment is supported by legal factors); Restatement (Second) Torts § 434 cmt. d.

B. Because the Railroads and Shell Presented No Evidence on Divisibility of Harm, the Record Is Insufficient to Support a Reasonable Basis for Apportionment of Liability

1. While liability under CERCLA generally is joint and several, a responsible party may establish that liability may be apportioned consistent with the Restatement's common law principles

Under CERCLA, "[l]iability is strict and is typically joint and several." *Hercules*, 247 F.3d at 715. CERCLA does not directly address the availability of apportionment of liability. *See* 42 U.S.C. § 9607. The circuits that have addressed these questions have looked to common law principles of tort in general, and the Restatement in particular, for guidance as to when and how to impose joint and several liability under § 9607(a). *See, e.g., Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 684 (5th Cir. 2002) (holding that apportionment of CERCLA liability is matter of federal common law), *rev'd on other grounds, Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004); *United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 697 (10th Cir. 1999) (same); *Brighton*, 153 F.3d at 329 (same); *Monsanto Co.*, 858 F.2d at 171 (same).

Circuit court discussions of apportionment routinely start with citation to *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (D.C. Ohio 1983). In

Chem-Dyne, the United States sued 24 defendants that had allegedly generated or transported hazardous substances located at the *Chem-Dyne* facility. Defendants sought a determination that they could not be held jointly and severally liable. *Id.* at 804. The *Chem-Dyne* court held that while express language holding CERCLA responsible parties jointly and severally liable had been removed from the final legislation, *id.* at 806, (citing 126 Cong. Rec. S14964 (Nov. 24, 1980) and 126 Cong. Rec. H11787 (Dec. 3, 1980)) this did not mean that CERCLA prohibited joint and several liability. *Id.* at 807. Rather, the court reasoned, "the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis." *Id.* at 808.

The *Chem-Dyne* court further held that the scope of liability should be interpreted according to a federally created uniform common law informed by the Restatement (Second) of Torts, *id.* at 809-10. Summarizing, the *Chem-Dyne* court noted:

> [W]hen two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. Restatement (Second) of Torts, §§ 433A, 881

> (1976). . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Restatement (Second) of Torts, § 875. . . . Furthermore, where the conduct of two or more persons liable under § 9607 has combined to violate the statute, and one or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant. *Id.* at § 433B. . . . These rules clearly enumerate the analysis to be undertaken when applying 42 U.S.C. § 9607 and are most likely to advance the legislative policies and objectives of the Act.

Id. at 810.

Shell and the Railroads agree with *Chem-Dyne* and the court below that the appropriate starting point for the rule of apportionment applicable to CERCLA cases is Section 433A of the Restatement (Second) of Torts. (Shell Br. 37; Railroads Br. 6; Pet. App. 24a); *see, e.g., Hercules*, 247 F.3d at 716 n.9, 717; *Bell Petroleum*, 3 F.3d at 895; *Chem-Dyne*, 572 F. Supp. at 810. Section 433A provides for the apportionment of damages where a defendant can show either (1) "distinct harms" or (2) a "reasonable basis for determining the contribution of each cause to a single harm." *Hercules*, 247 F.3d at 717 (quoting Restatement (Second) of Torts § 433A). "Damages for any other harm cannot be apportioned among two or more causes." Restatement (Second) of Torts § 433A(2).

As the *Hercules* court notes, however, the Restatement test is not a perfect fit in CERCLA cases and must be harmonized to fit that law. *Id.* "Thus, for example, although the Restatement contemplates that plaintiffs bear the burden of proving causation, in a CERCLA case, once the government has established the four essential elements of liability the burden shifts to the defendant to demonstrate, by a preponderance of the evidence, that there exists a reasonable basis for divisibility." *Hercules*, 247 F.3d at 717 (citing *Brighton*, 153 F.3d at 318 and *O'Neil v. Picillo*, 883 F.2d 176, 182 (1st Cir. 1989)).

2. Apportionment is appropriate where a responsible party can show distinct harm, successive injuries, or divisible harm, except where injustice to plaintiff will result

Because Shell and the Railroads rely in part on the examples in the Restatement where apportionment is allowed, California will reiterate those examples, and their underlying policies, and apply them to scenarios that occur in CERCLA cases.

Distinct harms. The Restatement first discusses the concept of "distinct harms"

> which, by their nature, are more capable of apportionment. If two defendants independently shoot the plaintiff at the same time, and one wounds him in the arm and the other in the leg, the ultimate result may be a badly damaged plaintiff in the hospital, but

> it is still possible, as a logical, reasonable, and practical matter, to regard the two wounds as separate injuries, and as distinct wrongs. The mere coincidence in time does not make the two wounds a single harm, or the conduct of the two defendants one tort.

Restatement (Second) of Torts § 433A cmt. b.

Where there are discrete harms flowing from discrete acts, the Restatement allows a court sizable latitude to divide those harms, notwithstanding imprecision. "There may be difficulty in the apportionment of some elements of damages, such as the pain and suffering resulting from the two wounds, or the medical expenses, but this does not mean that one defendant must be liable for the distinct harm inflicted by the other." Restatement (Second) of Torts § 433A cmt. b. For distinct harms, the common law allows for apportionment by "a rough estimate which will fairly apportion such subsidiary elements of damages." Apportionment by "rough estimate" applies only to "distinct harms" presumably on the stated policy ground that a defendant should not be held liable for a completely separate harm caused by another. *See* Restatement (Second) of Torts § 433A cmt. b.

In the CERCLA context, a defendant may show "distinct harm" by establishing, for example, relevant "geographical considerations." *Hercules*, 247 F.3d 717 (citing *Akzo Coatings, Inc. v. Aigner Corp.*, 881 F. Supp. 1202, 1210 (N.D. Ind. 1994), *clarified on reconsid.*, 909 F. Supp. 1154 (N.D. Ind. 1995) and

United States v. Broderick Investment Co., 862 F. Supp. 272, 277 (D. Colo. 1994)). Distinct harms may be shown where, for example, a site consists of discrete, non-contiguous areas of contamination, *see, e.g., Akzo Coatings*, 881 F. Supp. at 1210; *Kamb v. United States Coast Guard*, 869 F. Supp. 793, 798 (N.D. Cal. 1994), or where there are separate and distinct plumes of ground water contamination emanating from separate releases, *see Broderick*, 862 F. Supp. at 277; *see also Brighton*, 153 F.3d at 320 (remanding matter to trial court to determine if CERCLA apportionment available based on a showing that defendant's "operating activities were completely limited to a discrete and measurable section of the property, and that the releases onto or from that section represented a discrete and measurable harm"). Where the harm cannot be "fingerprinted to determine its exact source" the "distinct harms" rule is inapplicable. *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1120 (D. Idaho 2003) (finding no distinct harms where mine tailings from numerous operations combined over a period of years to create environmental pollution in basin).

Successive injuries. The Restatement next allows for apportionment in the case of successive injuries. It states:

> The harm inflicted may be conveniently severable in point of time. Thus if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a

> separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other.

Restatement (Second) of Torts § 433A cmt. c.

In the case of a successive injury, a court is able to compare "apples to apples" because each defendant has engaged in the same activity, causing substantially the same type of harm. The case of *Bell Petroleum* is illustrative. In that case, releases of hazardous substances from a chrome plating shop over a six-year period, under the successive tenure of three different operators, contaminated a nearby aquifer. *Bell Petroleum*, 3 F.3d at 892-93. The Fifth Circuit noted that "[t]he chromium entered the ground water as the result of similar operations by three parties who operated at mutually exclusive times" and that, therefore, "it is reasonable to assume that the respective harm done by each of the defendants is proportionate to the volume of chromium-contaminated water each discharged into the environment." *Id.* at 903.

In *Bell Petroleum*, one of the defendant operators, Sequa, "introduced expert testimony regarding a volumetric approach to apportionment" by calculating the total amount of chromium that had been introduced into the environment by each of the operators, collectively and individually, in part based on electrical usage records. *Id.* at 904. Sequa also introduced evidence of chrome flake purchases during each operator's tenure, the value of the chrome-plating

done by each, summaries of sales, and various witnesses regarding the rinsing and wastewater disposal practices and the amount of chrome-plating activity conducted by each defendant operator. *Id.* at 903-04. On these facts, the Fifth Circuit held that Sequa had by expert testimony and other evidence established a factual basis for making a reasonable estimate that would fairly apportion liability. *Id.* at 903.

Divisible harm. Finally, the Restatement allows for apportionment where there is "divisible harm." This category of harms differs from "distinct harms" discussed above; these harms, "while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible." Restatement (Second) of Torts § 433A cmt. d. The Restatement includes the following oft-cited example of trespassing cattle:

> Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.

Restatement (Second) of Torts § 433A cmt. d. The Restatement includes a second example, more easily

applied to releases of hazardous substances: "Thus where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree . . . ." *Id.* Unlike the "rough estimate" allowed where there are truly "distinct harms," however, the Restatement provides that liability in the case of harms that are merely "divisible" be apportioned "among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream." *Id.*

As the courts have recognized, "divisible harm" is "perhaps the most difficult type of harm to conceptualize." *Bell Petroleum*, 3 F.3d at 895. In many cases "where wastes of varying (and unknown) degrees of toxicity and migratory potential commingle," CERCLA defendants simply will be unable to prove divisibility. *O'Neil*, 883 F.2d at 178-79; *see also Chem-Nuclear*, 292 F.3d at 260 (source of at least 80 drums of hazardous waste could not prove by preponderance of the evidence that it sent no other drums to site, held joint and severally liable for cleanup of entire site). Still, a responsible party may be able to show divisible harm, even in a complex CERCLA case. For example, a defendant held liable with many others for waste sent to a site may be able to establish that the harm resulting from its waste can be distinguished based on "proof disclosing the relative toxicity, migratory potential, degree of migration, and synergistic capacities of the hazardous substances at the site." *See Alcan*, 990 F.2d at 722.

Where a defendant presents "no evidence, however, showing a relationship between waste volume, the release of hazardous substances, and the harm at the site," the defendant has not met its burden to show divisible harm. *Monsanto,* 858 F.2d at 172. In those circumstances, the default of joint and several liability must control. A court should not make an "'arbitrary apportionment for its own sake.'" *Hercules,* 247 F.3d 717 (quoting Restatement (Second) of Torts § 433A cmt. i.) As the comments to the Restatement explain, the burden of proving that the harm is capable of apportionment is placed on the defendant to avoid "injustice":

> In such a case the defendant may justly be required to assume the burden of producing that evidence [supporting apportionment], or if he is not able to do so, of bearing full responsibility. As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm should fall upon the former.

Restatement (Second) Torts § 433B cmt. d.[5]

[5] In a similar vein, the Restatement notes that "[e]xceptional cases" may "arise in which injustice to the plaintiff may result" from apportionment. Restatement (Second) of Torts § 433A cmt. h.

> It may, for example, appear that one of two tortfeasors is so hopelessly insolvent that the plaintiff will never be able to collect from him the share of the damages allocated to him . . . . In such cases the application of

(Continued on following page)

3. The Railroads and Shell introduced, and the record contained, no evidence to support apportionment

In this case, the district court purported to apportion sua sponte the governments' harm – their response costs – based on various geographic, volumetric and chronological considerations. As noted above, these attributes may allow for apportionment of CERCLA response costs where they are relevant to dividing the harm, and where they are supported by evidence. In this case, however, the district court's calculations were not based on evidence showing that the harms were distinct, severable based on time, or otherwise divisible on a reasonable and rational basis. At bottom, the district court engaged in an equitable allocation, an exercise not properly part of an apportionment determination.

> the rule stated in Clause (b) would mean that the innocent plaintiff would be forced to bear the share of the loss due to the defendant from whom he could not collect the damages, and the liability of the other tortfeasor would be reduced accordingly. Nothing in this Section, or in the Comments, is intended to say that the court may not, in a case where justice requires it, refuse to apply the rule stated in Clause (b).

Id. As discussed in the Statement, the operator of the facility, Brown and Bryant, is insolvent, and the governments therefore will not be able to collect from it.

a. There is no basis in the record to apportion the Railroads' liability

The Railroads' relationship to the site does not fit neatly into any of the categories allowing apportionment set forth in the Restatement. The district court identified no distinct harms related to California's response costs, such as geographically discrete areas of contamination located in segregated areas.[6]

Rather, as the district court found, the Railroad parcel and the B&B parcel constituted one facility; the Railroad parcel was connected to the pond on the B&B parcel by a pipe, and the contaminants of concern – D-D, Nemagon and dinoseb – were released on both parcels. The resulting ground water plume was "indivisible." (*Id.* at 172a, 174a.) The district court expressly found that "[t]here is no evidence to quantify the difference in volume of the releases" from the two parcels. (*Id.* at 252a.) The court found that "[i]t is

[6] The district court found that there was a "hot spot" of dinoseb contamination on the B&B parcel resulting from a 1983 tank leak. (Pet. App. 137a.) EPA spent $1.3 million on the "hot spot." (Pet. App. 253a.) The district court determined that Shell was not liable for any part of the response costs related to the dinoseb spill cleanup, (*id.*), a determination that the governments did not appeal. (Pet. App. at 56a-57a.) The district court did not make findings related to the dinoseb "hot spot" in ruling on the Railroads' liability. To California's knowledge, the Railroads did not argue in their petition for certiorari that the district court's failure to exclude costs related to the dinoseb "hot spot" constituted error.

not within the realm of science to quantify the contribution from the Railroad parcel over the ground surface or through focused infiltration that has reached the groundwater under the Site." (*Id.* at 112a.)

California and the United States incurred costs related to soil and ground water investigation and remediation of the entire site, including both parcels, and neither Shell nor the Railroads presented evidence at trial to divide those response costs as between the parcels. Under these circumstances, the fact that the Railroad parcel constituted 19% of the site is legally irrelevant to the harm at issue – the response costs incurred by the State and federal governments related to soil and ground water contamination. California is aware of no case where a court has apportioned liability in a CERCLA 107 action based only on the relative area of a portion of a site containing commingled contaminants and without any evidence establishing distinct harms.

Neither does this case present an example of successive liability, conveniently severable by successive site operators taking over operation of the same facility at successive points in time. Rather, it involves liability that arises from the parties' different and distinct roles at the site; their liability is not successive, but runs concurrently.

Although, as they did below, the Railroads have taken an all-or-nothing approach in their briefs to this Court, it may be argued that the Railroads'

liability should be no greater than what it would have been under a successive liability scenario. That is, if the Railroads assumed the operation of the Brown and Bryant facility for the period of the 13-year lease, they might arguably show that they should be held liable only for the contamination that occurred in those years, which constitutes 45% of the site's 29-year period of operation.

This argument is appealing, but fails for the simple reason that, unlike the defendant chrome plate shop operator in *Bell Petroleum*, the Railroads chose not to attempt to "prove up" the volumes of releases in each year of operation. The limited evidence in the record, specifically, the five years of data for the delivery of the single chemical D-D, suggest that, in fact, operations, and therefore releases, cannot be presumed to be substantially similar over the entire period of the facility's operation. (*See* Pet. App. at 89a-90a, 253a-54a.) Accordingly, the district court had no basis to apportion based on volumetric or chronological data. The Railroads suggest that Brown and Bryant took greater care in later years to reduce releases. (Railroads Pet. 45.) This qualitative observation, however, does not allow a court to make any reasonable inference about the quantity of releases that occurred in any given year, especially since it is untethered to the volume of chemicals actually delivered, stored, and distributed from the site.

Divisibility of harm, similarly, is inapplicable in this case. All chemicals, including D-D, were present and released on all parts of the site, albeit in varying volumes. As discussed in the Statement, numerous activities, including the storage of chemicals and the washing of equipment, trucks and the warehouse, took place on the Railroad parcel. The Railroads' connection to the facility flows from its lease to Brown and Bryant. Because it is impossible to characterize the activities of Brown and Bryant on the western portion of its facility as severable from those on the eastern portion, it is also impossible to sever the Railroad parcel from the B&B parcel for purposes of apportionment. Stated simply, the district court's arbitrary assignment of a value of ⅔ based on the fact that Nemagon and dinoseb were stored on the Railroad parcel – ignoring that D-D repeatedly was *spilled* on the Railroad parcel – has no rational connection to the rule of divisible harm.

The district court's error on each of these asserted bases for apportionment was compounded by the fact that the court multiplied each ungrounded factor, at each step of the faulty equation, dramatically reducing the Railroads' fractional share of liability. The court of appeals was correct to find the district court's unprecedented apportionment exercise to be clear error.

b. There is no basis in the record to apportion Shell's liability

As discussed above, to arrive at an "equitable" apportionment of harm for Shell, the district court used gross sales data for the chemical D-D available for five[7] of 23 years that Shell delivered chemicals to the site. It then used a series of court-created calculations to arrive at a ratio of D-D that spilled or leaked on delivery, as compared to D-D that spilled or leaked in all other aspects of Brown and Bryant's operations. The court calculated the percentage at 6% and apportioned liability to Shell accordingly.

As with the case relating to the Railroads, there is no evidence that the harm related to Shell's actions as an "arranger" is distinct from the other harms at the facility.[8] The hazardous constituents in the D-D spilled during delivery mixed and commingled with the D-D that spilled and leaked everywhere else throughout the Brown and Bryant facility over the long period that the facility was in operation. Nor is this a case of successive injuries involving successive operators; the spills that are related to Shell's

[7] As discussed in the Statement, the district court chose to disregard D-D sales data for 1986 because the amount during that year (26,000 gallons), in the court's view "is so significantly less than in other years as to be statistically aberrational." (Pet. App. 253a.) Whether the five remaining years of data were aberrational when compared to the other 18 years of chemical delivery cannot be determined on the record.

[8] For a discussion of the dinoseb "hot spot," *see* footnote 6, *supra*.

delivery arrangement with Brown and Bryant occurred contemporaneously with Brown and Bryant's operation.

As with the Railroads, it is possible that Shell could have provided evidence that, at most, it should be held liable only for the years during which it arranged for delivery of chemicals – 23 of the site's 29 years of operation (79%) – but Shell chose for strategic reasons to deny all liability and not present evidence relating to apportionment. The sole question, then, is whether there was evidence in the record sufficient to show that the harm was divisible based on a "reasonable and rational basis" – i.e., "evidence of the respective quantities of pollution discharged . . ." Restatement (Second) Torts § 433A cmt. d.

As the district court itself noted before proceeding to apportion liability, "Shell did not present evidence how its products' contribution to the contamination at the Arvin facility can be apportioned." (Pet. App. 252a.) Believing that it was required to engage in an apportionment notwithstanding Shell's failure of proof (*id.* at 237a), the district court made its best guess at how much D-D was delivered every year for the 23-year period that Shell acted as an "arranger" based on five years of chemical sales data (122,390 gallons per year); based on some general evidence of delivery truck capacities (~4,500 gallons), its best guess at how many deliveries per year were required to deliver the chemical (27); and its best guess about how much chemical spilled on average during each delivery (three gallons) based on

testimony that "a few cupfuls to five gallons" spilled on every delivery, to arrive at a numerator for its ratio (23 x 27 x 3 = 1,863 gallons spilled during delivery).

The court then assumed that it could identify every other activity on the Brown and Bryant site that resulted in releases of the D-D after the chemical was placed into the bulk tanks (e.g., transfer of D-D from bulk storage to bobtails; transfer of D-D to rigs; and checking of nurse tank filters); and made a series of factually unsupported assumptions about both the regularity of the relevant events (e.g., assumed that bobtails were washed out 70% of the time) and the amount of D-D that spilled or leaked at each point (e.g., in transferring D-D from the bulk tank to the bobtails, though "[t]he spills are not quantified . . . it is assumed that spills ranged from a cup to [a] quart") to arrive at the denominator for its ratio. As noted above, the district court concluded: "The percentage of D-D spills resulting from Shell deliveries is calculated by dividing 1,863 gallons (the D-D spilled through Shell controlled deliveries) by 31,212 gallons (the total amount of D-D spills) to equal approximately 6%."

The district court's sua sponte, back-of-the-envelope apportionment in this case stands in marked contrast to that in *Asarco*, 280 F. Supp. 2d 1094 (D. Idaho 2003), a case cited by Shell. In *Asarco*, defendant mining companies, Asarco and Hecla, along with other mining companies released tailings containing hazardous metals into the Coeur D'Alene

Basin over the period of many years. The parties to the litigation retained experts to calculate the amount of tailings released by the various companies' ore milling. *Id.* at 1104. The experts investigated the operations of 22 mills, representing 97-98% of the mining production in the basin. *Id.* at 1105. By evaluating the tonnage of material that went into each mill as compared to the concentrate produced, historical information on milling methods, and the type of concentrate used, the experts estimated the total tailings released into the basin at 64,390,000 tons, and that Asarco's and Hecla's contributions were 22% and 31% respectively. *Id.* The *Asarco* court rightfully noted that "estimating releases is not an exact science" and acknowledged that "[d]ivisibility of the common harm to the Basin based on causation using volumetric calculations may not be the 'perfect' method of divisibility"; based on the expert testimony, the court held it to be "reasonable based on the historical facts available in this particular case." *Id.* at 1120.

California acknowledges that in *Asarco*, the parties' experts on tailing releases necessarily estimated recovery rates since there were no detailed company records setting out this information. *Id.* at 1120. The experts, however, relied on historical evidence of milling methods in making these estimates. *Id.* at 1105 n.9. The evidence for divisibility did not consist of assumptions or best guesses made by the trier of fact, but of expert testimony, which satisfied the requirements of Rules 702 through 706

of the Federal Rules of Evidence.[9] The *Asarco* case thus does not stand for the proposition that a trial court can create its own expert evidence where defendants have failed to introduce it.[10] The district court's reliance on speculation, based on its own unsupported assumptions, constitutes clear error. The court of appeals properly did not allow the district court's best guesses to substitute for evidence that would support apportionment.

Shell contends that any rule that would deny it apportionment in this case effectively amounts to

[9] Requiring evidence in the form of expert testimony rather than allowing the trier of fact to rely on unsupported assumptions affords the plaintiff the opportunity to counter such testimony with that of its own experts. California and the United States were denied that opportunity in this case.

[10] A court may, of course, make certain limited and supported assumptions in apportioning liability. Taking the Restatement's example of the trespassing cattle, it may be reasonable for a court to assume (unless there is contrary evidence) that the cows are of a similar size and weight and tend to behave in similar ways such that each owner is liable to the injured farmer in proportion to the number of cows. *See* Restatement (Second) of Torts § 433A cmt. d. This is eminently reasonable where the mechanism of harm is the action of a group of wayward cows on a single occasion, but it does not sanction the degree of speculation in which the district court engaged in this case. Nothing suggests that a court could, for example, apportion the crop damage for 30 years of trespass by assuming that the average farm has 5 cows, 5 sheep, and 5 pigs on any given year, and the average animal escapes 3 times per year, a cow tends to eat a pound of grain on each escape, a sheep ½ pound, and a pig ¼ pound, and so on.

mandatory joint and several liability. (Shell Br. 32.) This argument is unsupported. In this case, the court of appeals did no more than apply the long-established "rule placing the burden of proof as to apportionment upon the defendant . . . ." Restatement (Second) of Torts § 433B cmt. d. As the Restatement provides, the reason for the rule, which is consistent with the purposes underlying CERCLA, is to avoid the injustice of leaving the plaintiff to bear the costs of harm that "has combined with similar harm" inflicted by others. *Id.* "In such a case, the defendant may justly be required to assume the burden of producing that evidence, or *if he is not able to do so, of bearing full responsibility*." *Id.* (emphasis added). The same rule should apply where, as here, a defendant chose to take an all-or-nothing approach to liability and chose not to submit evidence supporting apportionment. California and the taxpayers should not bear the lion's share of the cost of the harm for which Shell and the Railroads are responsible.

c. By taking equity into consideration, the district court wrongly conflated apportionment of harm with allocation of damages

The circuit courts of appeals have recognized that apportionment under the Restatement and CERCLA Section 107 is not governed by considerations of equity, but rather by principles of causation of harm. *See, e.g., Hercules*, 247 F.3d at 718; *Brighton*, 153 F.3d at 319; *Monsanto*, 858 F.2d at 171 n.22; *Rohm &*

Haas Co., 2 F.3d at 1280. CERCLA does not, however, ignore equity. Rather, Congress expressly allowed parties that have resolved their liability to the United States or a state or that have been sued under Section 106 or 107 of CERCLA, 42 U.S.C. §§ 9606, 9607, to seek contribution from others that are liable or potentially liable. 42 U.S.C. § 9613(f)(3)(B); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. at 165-66. The statute expressly provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court deems appropriate." 42 U.S.C. § 9613(f)(1).

As this Court has noted, a defendant in a Section 107(a) suit can "blunt any inequitable distribution of costs by filing a § 113(f) counterclaim." *United States v. Atlantic Research Corp.*, U.S. , 127 S. Ct. 2331, 2339 (2007). California expresses no opinion about whether the district court's assumptions and best guesses might have been appropriate in a contribution proceeding where response costs would be divided equitably as between Shell and the Railroads. The law is clear, however, that such considerations have no place in apportioning harm, with the result that California, and its citizens, having no connection to the Brown and Bryant site and having benefitted in no way from its operation, bear 85% of the site cleanup costs.

♦

CONCLUSION

For the foregoing reasons, California respectfully requests that the Court affirm judgment of the court of appeals.

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